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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 494

NORMAN MASTRIAN,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF OBJECTIONS TO PETITION

Respondent, State of Minnesota, appears and opposes the Petition for Writ of Certiorari in the within matter for the following reasons:

A. The history of the proceedings in the case thus far indicate clearly that Petitioner has at no time been deprived of any constitutional rights or privileges. On the contrary, the record shows a complete and thorough solicitude on the part of the judiciary and officials involved to the end that

the constitutional and statutory rights of Petitioner be protected at all times. Petitioner has had the benefit of the advice of competent counsel at all times, and has enjoyed a thorough and impartial review on the issues involved by the Courts of the State of Minnesota. The correct Federal constitutional principles have been applied.

B. The trial of the criminal proceedings involved in the within matter will hopefully take place in the immediate future, at which time the issues raised in the within Petition for Writ of Certiorari will become moot. This event may possibly occur before this Court could issue its Writ of Certiorari in the matter; and almost certainly will occur before a decision could be made upon the argument necessarily involved in a hearing of the matter on the merits.

ARGUMENT

Under the history of the proceedings had in the within matter thus far, the Court will note that the Petitioner, Mastrian, has been incarcerated in the Ramsey County Jail since April 18, 1963. The bail for his release was set by the Municipal Court, Judge David E. Marsden presiding, in the amount of $100,000.00. Under the statutes of the State, particularly M.S. 1961, Section 629.44, this authority is conferred upon the Municipal Court. This amount of bail was re-examined in the Ramsey County District Court when the Indictment of the Grand Jury was returned, and the District Court, the Honorable John W. Graff presiding, also set bail for this Petitioner at $100,000.00. Upon a motion for reduction of bail filed by this Petitioner in the Ramsey County District Court, the particular issue was raised with reference to the amount of bail, and a thorough consideration of the

matter was given by Judge John W. Graff. The attention of this Court is invited to the learned memorandum of Judge Graff, which has been printed in the Petitioner's moving papers at page 22. This Court will note that in the main Judge Graff relied upon the opinion of the Minnesota Supreme Court in the case of *In Re Application of Shetsky for Return of Bail Money*, 239 Minn. 463, 60 N.W. 2d 40. In his memorandum the Judge clearly stated the basis and principle upon which he relied in denying the application for reduction in bail. These were the sound and proper constitutional principles. The bail was therefore allowed to stand at the figure of $100,000.00, which was a reflection of the opinion of Judge Graff as to the amount necessary and proper. This Order of the District Court was appealed to the Minnesota Supreme Court, and on this appeal the matter was again examined and given review by the Minnesota Supreme Court on briefs submitted by both the Petitioner and the State. After consideration of the matter, that Court was of the opinion that the Defendant had not established a deprivation of his constitutional rights. The basis for the opinion of the Minnesota Supreme Court is clearly stated in that opinion, a copy of which is printed commencing at page 26 of the Petitioner's moving papers. This Court will note that specific reliance was placed upon the proper Federal authorities, and that the Minnesota Supreme Court, as well as the Ramsey County District Court, has applied the proper Federal standards to facts in this case to support their decisions that the constitutional rights of this Petitioner have been protected.

Three separate Courts have independently, therefore, reviewed the facts involved in this matter, and have come to a conclusion that bail set in the amount of $100,000.00 is rea-

sonable and proper under the circumstances, and that the order setting bail in this amount does not deprive Petitioner of his constitutional rights in any manner.

EVIDENCE BEFORE THE COURTS

A statement or inference is raised in the Petitioner's moving papers for this Writ to the effect that the prosecution should introduce evidence and make affidavits and allegations in support of or explanation of the request for the amount of bail. The Petitioner points out that he has filed affidavits. This issue was raised in *Carbo v. United States*, 288 Fed. 2d 282 (1961), 9th Circuit. In this case the Court stated at page 286:

> "In referring to a reasonable foundation we are not speaking in terms of kinds of evidence, such as all testimony or documentary evidence—or even of affidavits. Where such a problem develops on short notice at the outset or during the progress of a trial, the trial court may well be entitled to rely upon oral representations of counsel, or the Court's own observations, or even the 'feel' of the atmosphere of the trial."

The attention of the Court is respectfully invited to the inherent problems of a criminal trial dealing with a crime which has caused a great deal of public interest and notoriety. The Defendant is entitled to be tried by a fair and impartial jury. The United States Circuit Court of Appeals, Second Circuit, has indicated in *United States v. Dennis*, 313 Fed. 2d 364 (1963), that reversible error may occur where potential jurors are affected by pre-trial publicity. On page 373 is found the following language:

> "The opinions formed in this case, moreover, were based not solely on accounts of the crime at issue, but on ac-

counts of admissions of many other crimes not on trial, and on *accounts containing expressions * * * of the district attorney.*" (Emphasis supplied.)

In the same case, on page 372, is a reference "to obviate the effects of prejudicial publicity *to which the district attorney had heavily contributed.*" (Emphasis supplied.) Any affidavits filed in the District Court proceeding would be a matter of record and consequently available to the news, radio, and TV media. It was with this thought in mind that the State chose to rely on representations made in Court to the presiding judge in such a manner as to be unavailable to the various news media for use which might later prove to be prejudicial to the Defendant. It is apparent from the memorandum accompanying the District Court order that the presiding judge understood the State's position and representations, and properly exercised his discretion in continuing bail at $100,000.00.

LAW APPLIED BY THE COURTS

The Federal law outlining the tests to be applied by the Courts in arriving at a proper bail figure is outlined in the case of *Carbo v. United States*, 82 Supreme Court 662 (1962). Also see *United States v. Dio Guardi*, 287 Fed. 2d 57, and *Lupino v. United States*, 258 Fed. 2d 792, and *Cohen v. United States*, 7 L. Ed. 2d 13; 82 Supreme Court 8. These cases outline tests and standards which are substantially in conformance with those outlined by the Supreme Court of the State of Minnesota and those relied upon by the District Court of Ramsey County, and indeed spelled out in Minnesota Statutes and the Minnesota Constitution. It is submitted that the tests

applied by the State Courts in this matter have been those which have been applied by the Federal Court when the question has been raised, and that Petitioner's rights under the Federal Constitution have been adequately protected in the matter.

THE ISSUES WILL BECOME MOOT

Under Minnesota Statutes (M.S. 631.02) and local practice, the issues with reference to bail are re-examined upon commencement of trial. The defendant may be committed to custody during trial or bail may be continued. In any event, upon completion of the trial bail terminates. In event of appellate proceedings, a new application for bail may be made by the defendant. It is submitted that the suggestion of the Minnesota Supreme Court in its opinion that the right of the Defendant to move for a speedy trial in the event he can not make bail may be the solution to his problem is appropriate to Petitioner's position. The State moved to commence trial on October 7, 1963, and at a hearing on that motion before the District Court the defendant requested the Trial Court not to set the matter for trial until after November 1, 1963. The Court set the matter for trial on November 18, 1963.

With reference to the jurisdiction of the Court in the matter, the attention of the Court is invited to the State Supreme Court opinion indicating that its opinion in the matter was rendered without prejudice to the right of the defendant to make further application with such additional evidence as the opinion of the State Supreme Court suggested. In this regard it may be suggested to this Court that the Court may be without jurisdiction in the matter for lack of a final judgment or

order of a State Supreme Court. By its nature, the matter involved in this Petition should not be heard without a reference to a master or referee for the purpose of obtaining additional evidence from the State before a determination is reached as to a proper bail amount. It may be that this element in the case removes the matter from the jurisdiction of this Court.

CONCLUSION

For the reasons outlined herein, it is respectfully requested that the Petition for Writ of Certiorari in the within matter be denied.

Respectfully submitted,

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ARGUMENT

Respondent suggests in its brief that representations of some nature were presented to the lower court in connection with either the setting of bail or the motion to reduce bail. Respondent states at page 5 of its brief, as follows:

> "It was with this thought in mind that the State chose to rely on representations *made in Court* to the presiding judge in such a manner as to be unavailable to the various news media for use which might later prove to be prejudicial to the Defendant." (Emphasis supplied.)

No representations or evidence of any kind was tendered the presiding judge in Court. If representations were made by the State, they were presented to the Court at an ex parte hearing and, consequently, were unavailable to the petitioner who could not counter them or test their veracity. The petitioner submits that this is not the type of hearing set forth as a requirement in *Stack v. Boyle*, 342 U.S. 1, 6, 72 S. Ct. 1, 4 (1951), for the protection of a person's constitutional rights.

The Respondent argues at page 6 of its brief that the bail issue will become moot since the matter is set for trial on November 18, 1963. At the hearing when the November date was set, William B. Randall, Ramsey County Attorney, indicated that since a companion case was going to trial on October 28, 1963, and might take some weeks to complete, the most likely prospect for trial in petitioner's case would be in January, 1964.

Respondent also suggests that the Minnesota Supreme Court judgment may not be final and that the bail matter should be referred to a referee so that the State can produce additional evidence. The petitioner at the outset of this case submitted its evidence and requested the State to do the

same and to comply with *Stack v. Boyle*. The State refused. The petitioner submits that by the very nature of his peculiar situation, for review of the lower court's determination to be effective and for preservation of his rights, the bail issue must of necessity be separable from the main case and be decided now. The State should not be allowed a hearing at this late date for the introduction of evidence before a Referee.

The petitioner submits that the Minnesota Supreme Court judgment affirming the lower court's denial of the motion to reduce bail is a final judgment as to the bail issue. The petitioner has presented the facts as to his background and finances and for all practical purposes there is nothing more to present to the Court. The Minnesota Supreme Court affirmed the lower court's order and that is a final judgment.

Respectfully submitted,

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